85-378

No. _____

Supreme Court, U.S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1985

V.L. ROBERTS AND
JOHNNY ROBERTS ..... *Petitioners*

V.

FAYE SIMPSON, EXECUTRIX OF THE
ESTATE OF CHARLES FRANKLIN BEEL,
AND THE ESTATE OF CHARLES FRANKLIN
BEEL, DECEASED ..... *Respondents*

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF ARKANSAS

Of Counsel:
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QUESTION PRESENTED

Whether this Court's interpretations of the Due Process Clause prohibit judiciary approval of the sale of estate personalty when no notice of hearing was given and the statutorily mandated hearing was not conducted.

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OPINIONS DELIVERED BELOW

1. The order of the Probate Court of Independence County, dated June 13, 1984, appears at page 1 of the Appendix and is unreported.

2. The opinion of the Court of Appeals of Arkansas, dated May 8, 1985, appears at page 4 of the Appendix and is not designated for publication.

3. The denial of the rehearing of the Court of Appeals of Arkansas, dated June 5, 1985, appears at page 12 of the Appendix and is not reported.

JURISDICTION

The Court of Appeals of Arkansas rendered its opinion in this case on May 8, 1985, and denied rehearing in this proceeding on June 5, 1985. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The XIV Amendment to the Constitution of the United States provides, in relevant part:

> "No state...shall deprive any person of life, liberty, or property, without due process of law,..."

Arkansas Statutes Annotated Section 62-2711 (Section 134 of Act 140 of 1949) provides:

> "The petition of a personal representative for authority to sell, mortgage, lease or exchange personal property of an estate shall be heard without notice, or upon such notice as the Court may direct. The Court if satisfied as to the necessity or desirability of such action, may order the personal representative to proceed with the sale or other disposition at public or private sale and upon such terms and conditions as by the Court may be specifically directed. The Court shall prescribe safeguards to insure that the sale, mortgage, lease or exchange is for an adequate consideration and for the best interest of the estate. The Court may, in its discretion, require confirmation of any sale or other disposition of personal property."

Arkansas Statutes Annotated Section 62-2710 (Section 132 of Act 140 of 1949), provides, in relevant part:

"...Sales or conveyances of property by a personal representative by proceedings not in substantial compliance with the provisions of this Code shall be void."

STATEMENT OF THE CASE

On October 29, 1983, the personal property of the Estate of Charles Franklin Beel was sold at a public auction. No hearing as required by Arkansas law preceded that sale and no order of the Probate Court authorizing any such sale was obtained. Notwithstanding such absences of a hearing and an order, the sale that was conducted on October 29, 1983 was in all respects confirmed by the Probate Court on June 12, 1984. (A. 1)

On appeal from the confirmation order of the Probate Court, it was held that the Probate Court's confirmation of the sale of the estate personalty cured that Court's failures to (1) conduct a hearing on the issue of whether the estate personalty should be sold and (2) enter an order authorizing the sale of estate personalty. (A. 8)

In the Court of first instance below, the Petitioner, V.L. Roberts, claimed in her Petition to Set Aside Sale "that said sale was conducted without notice to Petitioner, a legatee and devisee under the Will admitted to probate herein; was conducted without court order; and without authority under the Will admitted to probate herein." (R. 075). Moreover, the Petitioners herein, at pages 115 through 116 of their abstract and brief filed in the Court of Appeals of Arkansas, raised the issues of lack of notice, absence of hearing and absence of court order with respect to the sale of estate personalty.

The sale conducted without adherence to due process safeguards netted the estate a sum equal to fifty-five percent (55%) of the appraised value of the estate personalty, the latter figure being supplied by the Respondent Executrix in her accounting filed with the Court of first instance.

ARGUMENT

The Petitioner, V.L. Roberts, had and continues to have a property right in the estate of her deceased father, Charles Franklin Beel. That fact has never been disputed in this case. What has been disputed is whether such property right has been injured or lessened, and thus deprived of said Petitioner, without protection of legally mandated notice and hearing requirements. As stated earlier in this Petition, Arkansas Statutes Annotated Section 62-2711 requires that a personal representative of an estate obtain an order of the appropriate Probate Court before disposing of estate personalty. That legislative enactment is a further extension of the property right of the Petitioner, V.L. Roberts. The legislature has granted to her the protective safeguards contained in the referenced law, yet the Probate Court and the State Appellate Court have chosen to disregard the same, finding that confirmation of the sale cured any defect in the failure to comply with the statute.

This Court has held that, even in the absence of statutory safeguards, a property right once granted cannot be deprived without appropriate constitutional safeguards of notice and opportunity for hearing. *Cleveland Board of Education v. Loudermill*, 470 U.S. _____, 106 S. Ct. _____, 84 L.Ed. 2d 494 (1985).

In the present case, specific Arkansas law provided for, indeed required, that any sale of estate personalty be preceded by a hearing and an authorizing order of the Probate Court. The Appellate Court's finding, that the Probate Court's confirmation of sale cured its failure to require adherence to statutory requirements, misses the mark in more than one respect. First, no confirmation order can have a curative effect, for no one knows what might have transpired had the Petitioner, V.L. Roberts, been given an opportunity to present evidence at a hearing. Such a hearing may have resulted in different terms and conditions being imposed on a sale by the Probate Court, or

the Court may have found that the sale should not have been authorized at the particular time. Second, the referenced statute itself provides that, in addition to prescribing safeguards in an order authorizing a sale, the Probate Court may additionally require a subsequent confirmation of the sale. In other words, confirmation was intended to supplement, not replace, the requirements of a hearing and the authorizing order prior to the sale.

No attempt has ever been made in this case to afford the Petitioner, V.L. Roberts, even minimal constitutional protections. As stated by this Court in *Cleveland Board of Education v. Loudermill*, supra:

> "The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement." 84 L.Ed. 2d at 506.

The Petitioner, V.L. Roberts, did not receive that fundamental recognition of her rights. Consequently, unless this Court reverses the decision of the Court of Appeals of Arkansas, the Petitioners will never have an opportunity to have a say with respect to property in which they maintain a very real interest.

This Court has also held that, when due process requires a hearing, that hearing must be held at an appropriate, meaningful stage in the proceedings. *Armstrong v. Manzo*, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed. 2d 62 (1965). The only meaningful time at which a hearing in the instant case could have been conducted was prior to the sale of estate personalty. Once a sale has taken place, and property is disposed of, the only manner in which one can assess the harm done is through conjecture and artificial reasoning. Moreover, the damage done cannot be remedied by the stroke of a pen which confirms the sale. Due process requires as fundamental that notice and opportunity for hearing appropriate in the particular case be afforded.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

To some, the personal property at issue in the present case would not be of major value or worthy of this Court's consideration. However, a fundamental deprivation of an undisputed property right has been practiced upon the Petitioner, V.L. Roberts. Further, the unauthorized disposition of estate personalty is only one of the injustices that the petitioner has suffered in the proceedings below. Since the inception of the probate of her fathers' estate, said Petitioner has sought nothing more than the fundamental fairness which should be afforded anyone who maintains a genuine interest in property which is the subject of probate administration. Her pleas in contesting the testator's capacity to make a will and in contesting the genuineness of the will itself were summarily passed over by the Courts below. Although ample evidence was presented to the Courts below to substantiate a real injury done to the estate property be the Respondent Executrix, said Court again summarily disregarded the pleas of the Petitioner, V.L. Roberts. And, as a consequence of their findings in the aformentioned areas, the Courts below denied said Petitioner's reasonable request that the Respondent Executrix be removed from such capacity or, at least, be required to post an adequate surety bond in order to continue in such capacity. And, even though the Court of first instance found the accounting of the Respondent Executrix to be deficient, it substituted its own calculations rather than require said Executrix to perform her lawful duty with respect to such accounting. In addition, the record is undisputed that the Executrix, while serving in such capacity has not only mismanaged the estate but has misappropriated the estate's property and has not been held accountable by the Court below. Further, Petitioner Johnny Roberts, while maintaining an interest because of services performed for the decedent, has never been recognized as a serious claimant to the proceeds of the decendant's estate.

The Petitioner, V.L. Roberts, is left with but one avenue of redress, one final tribunal of justice to acknowledge that she, as a resident citizen of the United States, is in fact endowed with the fundamental right that her property cannot be deprived by the authority of the State of Arkansas without her first being afforded due process of law. The importance of that fundamental right warrants this Court's granting the Petitioner's request for a Writ of Certiorari to the Court of Appeals of Arkansas.

CONCLUSION

WHEREFORE, the Petitioners, V.L. Roberts and Johnny Roberts, pray that a Writ of Certiorari issue from this Honorable Court to review the decision of the Court of Appeals of Arkansas in V.L. Roberts and Johnny Roberts v. Faye Simpson, Executrix of the Estate of Charles Franklin Beel, and the Estate of Charles Franklin Beel, deceased. In the event that the Petition is granted, the Petitioners pray that the decision of the Court below be reversed.

Respectfully submitted,

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APPENDIX A

IN THE PROBATE COURT OF INDEPENDENCE COUNTY, ARKANSAS

IN THE MATTER OF THE ESTATE
OF CHARLES FRANKLIN BEEL, DECEASED
NO. P-81-118

ORDER AUTHORIZING FINAL DISTRIBUTION

Now on this 21st day of May, 1984, comes on for hearing the Motion for Requirement of Bond, the Motion to Remove the Executrix the Motion to Set Aside Order dated September 15, 1983, the Motion to Set Aside Sale and Assess Damages, the Petition to Compel Distribution, the Objection to Accounting, all filed herein by V.L. Roberts, and the claim of Johnny Roberts, said hearing being a continuance of the hearing originally commenced on May 8, 1984, and all parties having appeared personally and by their respective attorneys, the hearing was held and evidence presented to the Court, from all of which and other matters and things before the Court, the Court doth find:

(1) The claim of Johnny Roberts filed on May 7, 1982, is denied as is the Petition to compel payment of said claim.

(2) The motions of V.L. Roberts to remove Fay Simpson as executrix of the Estate is denied.

(3) The motion for requirement of a bond filed by V.L. Roberts is denied.

(4) The motion to set aside the Order of this Court dated September 15, 1983, filed by V.L. Roberts is denied.

(5) The motion to set aside the sale of personalty and to assess damages against the Executrix is denied and the

sale of assets at public auction on October 29, 1983, is in all respects confirmed.

(6) The petition to compel distribution, confessed by the Executrix, filed by V.L. Roberts is granted.

(7) The accounting filed February 28, 1984, and the supplementary accounting filed May 23, 1984, is not approved. A proper accounting in this Estate is as follows;

Charges to Executrix:

Bank balance at death of Mr. Beel	237.97
Cash on hand	6680.24
Insurance check	3.00
Insurance check	307.25
Funeral refund	1.55
Dividend check	7.52
Jar of pennies	23.33
Auction proceeds from sale of personalty	2826.08
Dividend check	1.65
	$10,093.59

Liability to Estate by Executrix:

(a) Debt to decedent-Simpson owed $4,000 and Roberts owed $3,000 so $3,000 of both debts should be cancelled as offsetting one another and the excess of $1,000 should be charged against Ms. Simpson	$1,000.00
(b) For use of baled hay stored on farm (2,000 @ $1.25)	2,500.00
(c) For use of farm from 11/15/81 to date	1,500.00
TOTAL CHARGES TO EXECUTRIX	$15,093.59

Credits to which executrix is entitled:

Total credits allowed	$8,389.60
BALANCE WHICH SHOULD BE IN ESTATE ACCOUNT AT THIS TIME.	$6,703.99

(8) The Executrix is directed to take the following actions when 30 days have elapsed from the date this Order is filed of record unless an appeal of such Order has been perfected:

(a) Pay Bill Walmsley an attorney fee in the sum of $1,703.99, from which he shall pay any outstanding court cost for which the Estate is liable and any fee which might be owed to the prior attorney for the estate. V.L. Roberts and Johnny Roberts shall pay the cost of serving any subpoenaes issued at the request of their attorney and any costs previously assessed against V.L. Roberts in the Order of this Court dated September 15, 1983.

(b) Execute and record an executrix's deed conveying title to the real estate from the estate to Faye Simpson and V.L. Roberts, as tenants in common.

(c) Pay V.L. Roberts the sum of $2,500.00 as her distributive share of the balance of the estate account, plus one-half of any interest that may hereafter accrue on said account.

(d) Remove all cattle from the real estate of the estate by June 1, 1984, unless she has negotiated a rental agreement with V.L. Roberts. The Executrix shall be liable for the electric bill on said real estate unless she and V.L. Roberts mutually agree to keep such service.

(e) Each party entitled to retain items of personalty in their respective possessions as their distributive share of the remaining personalty, except for the tank and diesel fuel which is the property of Johnny Roberts.

(f) Execute and deliver to North Arkansas Farm Supply, Inc., a bill of sale transferring title to the patronage stock from the estate to Faye Simpson and V.L. Roberts, one-half to each party.

(9) Upon filing receipts reflecting that distribution has been completed as ordered herein the executrix shall be discharged and the estate shall be closed.

(10) No executrix fee shall be allowed to Faye Simpson.

IT IS SO ORDERED.

_____

Carl B. McSpadden
Probate Judge

_____

Date

DIVISION I

ARKANSAS COURT OF APPEALS

	No. CA 84-312
V.L. Roberts and Johnny Roberts	Opinion Del. May 8, 1985
Appellants	Appeal from Independence
V.	County Probate Court
Faye Simpson, Executrix of the Estate of Charles Franklin Beel, and the Estate of Charles Franklin Beel, Deceased	Hon. Carl B. McSpadden, Judge
Appellees	Affirmed

LAWSON CLONINGER, Judge

Appellant V. L. Roberts and appellee Faye Simpson are the surviving daughters of Charles Franklin Beel, who died on November 15, 1981. In a will dated November 9, 1976, the decedent named appellee executrix of his estate. The will was admitted to probate on December 8, 1981, and appellee was appointed executrix in accordance with the terms of the instrument.

On May 7, 1982, appellant Johnny Roberts, the former husband of appellant V.L. Roberts, filed a claim against the estate, asking $12,075 for services rendered to the decedent during a three year period prior to Mr. Beel's death. Later that month, on May 24, appellant V. L. Roberts filed a petition to contest the will and a motion for requirement of bond.

A hearing on the petition to contest the will was held on September 15, 1983, and an order denying the petition was entered on October 3, 1983. Appellant V. L. Roberts filed motions and petitions on December 21, 1983, and May 2, 1984, to set aside the unauthorized sale of estate personalty, to assess damages against the executrix, to set aside the order denying the will contest, to object to the accounting, to remove the executrix, and to compel distribution of the assets of the estate. Appellant Johnny Roberts also filed a petition to require payment of his previously filed claim for services rendered.

The case was tried in probate court on May 8, and 21, 1984. The court entered an order on June 13, 1984, denying all but one of the motions and petitions and, as to that exception, authorizing final distribution. The court, moreover, disapproved appellee's accounting and ordered an amended accounting. From that order this appeal was taken.

Appellants' first argument for reversal is that the trial court erred in denying the claim of appellant Johnny Roberts against the estate and his petition to compel payment. The amount of the claim was $12,075, computed at the rate of $25 per day for a period of 161 days during the three years before Mr. Beel's death. Mr. Roberts stated that the decedent had told him he would be paid for his work, which consisted of feeding cattle, pulling and banding calves, administering medicine to farm animals, baling hay, and mending fences. According to Mr. Roberts, he and Mr. Beel had a close relationship, and he would work for the

decedent whenever needed. Although he conceded that his chores consumed only three or four hours a day, Mr. Roberts asserted that he was subject to call round the clock; thus, the $25 figure seemed to him a conservative estimate of the value of his time.

Long ago the Arkansas Supreme Court, in *Williams v. Walden*, 82 Ark. 136, 100 S.W. 898 (1907), said:

> The presumption is that services rendered by members of the same family . . . are gratuitous. Such services are enjoined by the reciprocal duties of the family relation, and are always presumed to have been promoted by natural love, rather than by the promise or the hope of pecuniary reward. 'Courts are reluctant to infer a pecuniary recompense from the performance of filial or parential duties such as humanity enjoins.' Hence the burden is upon him who claims a money recompense for personal services performed, whether voluntarily, or upon the request of the other, to establish a contract, expressed or implied, for such consideration.

See also Craig v. Hickman, 274 Ark. 628, 447 S.W.2d 120 (1969); *Wilson v. Dodson*, 203 Ark. 644, 158 S.W.2d 46 (1942). A contract for payment will not be implied unless the claimant proves that the services were of such an extraordinary nature that the recipient could not reasonably have expected them to be rendered without compensation. *Russell v. Baumann*, 239 Ark. 830, 394 S.W.2d 619 (1965); *Lineback v. Smith*, 140 Ark. 500, 215 S.W. 662 (1919).

We do not believe that the evidence presented by the appellant Johnny Roberts was sufficient to overcome the presumption discussed above. Mr. Roberts said that he often borrowed money from the decedent but never asked for payment for his services. Appellant also testified that he wrote checks for Mr. Beel to sign to pay the other workers engaged to haul hay, but he did not write out a check for

himself because "I wouldn't write one up for my dad" and the decedent "treated me just like a son." Under these circumstances, the finding by the trial court that there was no pay for services either expressed or implied is not clearly against the preponderance of the evidence.

In their second point for reversal, appellants contend that the court erred in denying the motion filed by appellant V.L. Roberts to set aside the order denying her petition to contest the decedent's will. Mrs. Roberts claimed in her petition that her father was not of a sound and disposing mind when he executed his will in 1976. She said she had recently discovered that her father concealed the fact that he had cancer and feared for his life. As a rule, one who challenges the validity of a will is required to prove by a preponderance of the evidence that the testator lacked mental capacity or was subject to undue influence at the time the will was executed. *Green, Gdn. v. Holland*, 9 Ark. App. 233, 657 S.W.2d 572 (1983). Apart from the fact that Mrs. Roberts had knowledge of her father's disease at the time of the hearing on her petition and could not therefore urge newly discovered evidence, appellant failed to demonstrate how her father's cancer translated into a lack of testamentary capacity.

On the same point, appellants contend that Mrs. Roberts was misapprised by her attorney of the nature of the hearing on the petition to contest the will and was thus unprepared. We are not persuaded by the brief argument presented that unavoidable casualty ensued.

Another contention made under the heading of appellants' second point is that the testimony of the two attesting witnesses to Mr. Beel's will was insufficient to prove due execution under Ark. Stat. Ann. § 60-403 (Repl. 1971). Neither the attorney who prepared the will nor his secretary, both of whom witnessed the instrument, could recall the exact circumstances surrounding the execution in 1976. Both witnesses stated that the procedure was an

often-repeated one for them. It is not surprising that they were unable to remember the precise details of a routine event that occurred seven years earlier. In the absence of evidence to the contrary, it will be presumed that a will has been executed in compliance with all the requirements of the law. *Anthony v. College of the Ozarks*, 207 Ark. 212, 180 S.W.2d 321 (1944). Nothing advanced by appellants defeats this presumption.

Appellants, in their third point, argue that the trial court erred in denying Mrs. Roberts's petition to set aside the sale of estate personalty and to assess damages against appellee. They contend that appellee lacked the authority to conduct a sale, as no court order was obtained authorizing an auction of personalty. Although this defect is contrary to the requirements of Ark. Stat. Ann. § 62-2711 (Repl. 1971), it was cured by the court's confirmation of the sale. Appellants were aware of the impending sale, which had been properly publicized, before it was held. Moreover, the trial court found that no loss had occurred as a result of the sale.

In their fourth point for reversal, appellants contend that the court erred in refusing to remove appellee as executrix of the estate and to appoint a personal representative in succession. The removal of a personal represenative is governed by Ark. Stat. Ann. § 62-2203 (Repl. 1971): "When a personal representative . . . has mismanaged the estate, [or] failed to perform any duty imposed by law . . . then the Court may remove him." The following statuory section, Ark. Stat. Ann. § 62-2204 (Repl. 1971), authorizes the court to appoint another personal representative in succession upon removal of the first.

As evidence of mismanagement of the estate, appellants point to the use appellee and her family made of estate vehicles, hay, and grazing land, the failure of appellee to maintain the forty-acre farm, and the sale of estate personalty without a court order. By the terms of

decedent's will, appellee was to receive all the cattle, trucks, motor vehicles, and all other farm machinery. There was evidence that appellee, as executrix of the estate, did not tend the farm as diligently as the decedent had, and there was evidence that appellee used the farm to graze her cattle, and that she used some of the hay stored in the barn to feed her cattle. However, the trial judge, in his order approving appellee's final accounting, required appellee to compensate the estate for her personal use of the land and hay. While we agree that appellee did not conduct estate affairs as well as she might have, it appears to us that the trial court, through its requirement of an amended accounting charging appellee with various estate losses, redressed the matter. Ark. Stat. Ann. § 62-2203 vests the court with discretion regarding the question of removal. We cannot say that appellants have demonstrated an abuse of that discretion.

Appellants' fifth point for reversal is that the trial court erred in denying the motion to require appellee to post a surety bond in order to serve as executrix. Ark. Stat. Ann. § 62-2212 (Repl. 1971) provides:

> The court may, at its discretion, and subject to subsequent revocations, dispense with the requirement of a bond, when by the terms of the will the testator directed or requested that no bond be required of the personal representative.

In the present case, the decedent specifically requested in his will that appellee serve as executrix of the estate without bond. Although mismanagement, waste, or conversion of estate assets are grounds for a court's revocation of its previous dispensation with a bond requirement, the decision rests largely in the discretion of the court, and we will not interpose to control that discretion in the absence of a showing of a manifest abuse. *Dillen v. Fancher*, 197 Ark. 995, 125 S.W.2d 112 (1939). Here,

the court found means by which to rectify any misdoing on the part of the executrix through the amended accounting; whatever damage that had occurred was thereby contained, and the court's action was well within the bounds of its statutorily-granted discretion.

In their final point, appellants charge that the court committed reversible error in "creating its own accounting" after disapproving the accounting filed by the executrix. In a letter opinion sent to appellee's attorney, the judge indicated that he would not accept the accounting as tendered by the executrix. He noted in a detailed list of estate items the amount of money due the estate from appellee, based upon the evidence presented him of her use of estate property, and directed the lawyer to draft an order incorporating the "proper accounting".

Appellants object that this procedure did not comport with the method set forth in Ark. Stat. Ann. § 62-2902(c) (Repl. 1971) under the heading "If Account Not Approved":

> If the final account be not approved the court shall enter an order specifying wherein and the extent to which the account is not approved, and directing such restatement of the account and such further action, if any, on the part of the personal representative as the court finds to be proper.

The judge appeared to be complying with the statutory requirement when he addressed his strictures on the accounting to appellee's counsel. He specified precisely what he was not approving in the accounting and directed a restatement that he would find proper. Appellants argue that the judge here set up his own "independent accounting" for which he lacked statutory authority; instead, they contend, he should have required appellee to prepare a new accounting. Yet this is exactly what he did in his letter opinion to appellee's attorney. His directions with respect to unsatisfactory items in the accounting were

designed to clarify for all concerned what he deemed proper. We cannot find a lack of compliance with the statute by the judge.

Regarding appellants' assertions that the amended accounting was in error concerning the value of the hay stored in the barn, we are of the opinion that the court acted within the limits of its discretion in weighing the conflicting evidence brought before it and reaching its decision. We decline to substitute our judgment for that of the trial judge acting as factfinder. Appellants offered evidence that 144 bales of the hay decedent owned at the time of his death belonged to appellants. However, no claim was filed against the estate and no demand of any nature was made to appellee until 1984. On that issue, also, we decline to substitute our judgment for that of the trial judge.

Affirmed.

Cooper and Glaze, JJ., agree.

OFFICE OF THE CLERK
SUPREME COURT OF THE STATE OF ARKANSAS
ARKANSAS COURT OF APPEALS
LITTLE ROCK

June 5, 1985

Dona L. Williams
Clerk

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Janie Owen
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RE: CA 84-312 V.L. Roberts et al v. Faye Simpson, Executrix

Dear Mr. Buckalew:

The Arkansas Court of Appeals made the following order today in the above styled case:

"Petition for Rehearing is denied."

Sincerely yours,

/s/ Dona L. Williams
Dona L. Williams, Clerk

DLW:mf

cc: Bill H. Walmsley
Margaret Boothby, Clerk